HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

RAJU KAMALJEET DHANHOA APPELLANT

AND

THE QUEEN RESPONDENT

Dhanhoa v The Queen
[2003] HCA 40
5 August 2003
S236/2002

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

T A Game SC with H K Dhanji for the appellant (instructed by Legal Aid Commission of New South Wales)

R D Ellis with S C Dowling for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

Dhanhoa v The Queen

Evidence – Identification evidence – Where reliability of evidence not in dispute – Whether trial judge required to inform jury of special need for caution before accepting evidence – *Evidence Act* 1995 (NSW), s 116.

Evidence – Inconsistency between appellant's statement to police and his evidence at trial – Where prosecutor did not contend that statement to police was a lie indicating consciousness of guilt – Whether trial judge should have given direction in relation to lies.

Words and phrases: "miscarriage of justice".

Criminal Appeal Act 1912 (NSW), s 6.
Evidence Act 1995 (NSW), ss 114, 115, 116.

1 GLEESON CJ AND HAYNE J. The appellant was convicted of robbery in company with wounding, and kidnapping. The victim, Mr Schembri, gave evidence that, on the evening of 19 January 1999, he met four men of Indian or Sri Lankan appearance in a hotel. At his invitation, they accompanied him back to his flat. There, after a brief interval, all four of them set upon him, wounded him, robbed him, took him from his flat at knife-point and attempted to force him into a car with a view to taking him to an automatic teller machine. Mr Schembri said that the time between arriving at the flat and leaving seemed about 15 or 20 minutes. In cross-examination he said that four to five minutes elapsed between his arrival at the flat and the commencement of the attack. It was suggested to Mr Schembri in cross-examination that the violence commenced later than he indicated, but he adhered to his evidence that he was attacked only a few minutes after he arrived at his flat, and rejected the proposition that half an hour or more elapsed between his arrival at the flat and his being taken out to the street.

2 The prosecution case was conducted as one of joint criminal enterprise; the case did not depend upon assigning to the appellant any particular individual role in the events that occurred. The trial judge, in his summing-up, told the jury:

> "The Crown says you will be satisfied beyond reasonable doubt that at all relevant times the accused was present when the acts described by Mr Schembri took place and therefore he is jointly responsible with the other three men [for] the robbery and wounding of Mr Schembri and also the taking [him off] from the unit for an advantage to themselves ...".

3 Following the events the subject of the charges, Mr Schembri broke loose from his assailants. The police were called, as was an ambulance. On 20 January 1999, the police took fingerprints at Mr Schembri's flat. Some time between 20 January 1999 and 27 September 1999, the police identified certain fingerprints as those of the appellant. (There was no evidence before the jury as to when this occurred, but it appears from the trial judge's remarks on sentence that the appellant was in police custody in respect of another matter from 10 September 1999). On 27 September 1999, the police interviewed the appellant about this matter.

4 The trial commenced on 1 May 2000. During April 2000, there had been an attempt to arrange an identification parade, but it failed because of difficulty in obtaining a sufficient number of people of an appearance similar to that of the appellant. On 28 April 2000, the police showed Mr Schembri 11 photographs. He told them, and repeated in his evidence on 2 May, that the man in photograph No 8 looked "very similar" to "one of the men that was there on the night". He also told the police, and repeated in his evidence, that two of the men looked like one another, that he was not sure which of the two was the man in photograph No 8, but that he believed the man in the photograph was the one who had "grabbed him by the neck and pinned him to the wall". This was a reference to

the commencement of the attack which, he said, was followed by all four men kicking and punching him.

5 The photographs shown to Mr Schembri on 28 April 2000, including the photograph of the appellant, were tendered and admitted into evidence at an early stage in the trial. In a pre-trial ruling on the admissibility of the photographs the trial judge rejected a submission that he should exclude them on the basis that their prejudicial effect outweighed their probative value. At the time the photographs were received in evidence, the fingerprint evidence had not been adduced. When the argument on admissibility was conducted, it was not known to the prosecution or the judge what the defence case would be, but counsel for the appellant made the point that the photographs were first shown to Mr Schembri some 16 months after the incident. This, presumably, went to the reliability of the identification of the person in photograph No 8 as one of the four men in question.

6 Two neighbours of Mr Schembri gave evidence of what they saw after he left his flat in the company of a number of men who tried to force him into a car. They both saw Mr Schembri struggling with three men, although they did not profess to be able to see the entire scene. The jury might have considered that their evidence was not inconsistent with the presence of a fourth man.

7 That was the background against which the appellant came to give his version of events in evidence. He did not challenge the fingerprint evidence. He did not deny that he was the man in photograph No 8. He did not deny that he and three other men had gone back with Mr Schembri to his flat on the evening in question. However, he said that he had left the flat and returned to his home before any violence occurred.

8 The two grounds of appeal that have been pressed in this Court concern suggested inadequacies in the trial judge's directions to the jury in relation to the identification evidence, and in relation to alleged inconsistencies between what the appellant said to the police when first interviewed about the matter and what he said in his evidence.

Identification

9 By the time the trial judge came to sum up to the jury it was evident that there was no challenge to the fingerprint evidence, or to Mr Schembri's evidence that the person shown in photograph No 8, who was undoubtedly the appellant, was one of the four men who had accompanied him back to his flat. The dispute was as to whether the appellant had participated in the attack upon Mr Schembri. The critical question was whether the appellant was still in the flat when the attack occurred. Mr Schembri said that the attack commenced a few minutes after he and the four men arrived at the flat. As the judge directed the jury, the

prosecution case, based upon participation in a joint criminal enterprise, did not depend upon the jury making any particular finding as to exactly what the appellant did, other than that he was present during the attack and the kidnapping. The evidence of Mr Schembri was that all four men were present when the attack was made, and they all participated in it. The issue was said by the judge to be whether the prosecution had proved beyond reasonable doubt "that [the appellant] was one of the group of men who were involved in ... the assault, the robbery and the wounding" and the kidnapping. Although Mr Schembri had, somewhat hesitantly, assigned a specific role to the appellant, in that he said he thought it was the appellant who had, at an early stage, taken him by the throat, the prosecution case did not depend upon a finding that the appellant had done that.

10 The trial judge did not give, and was not asked to give, any directions or warnings about the identification evidence. His failure to do so was the subject of a ground of appeal in the Court of Criminal Appeal. All three members of the Court (Meagher JA, Dowd and Kirby JJ) rejected that ground. The relevant principle was taken to be that stated by this Court in *Domican v The Queen*[1]:

> "Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence *where its reliability is disputed*." (emphasis added)

11 No reference was made in the reasons for judgment to s 116 of the *Evidence Act* 1995 (NSW) ("the Evidence Act").

12 Meagher JA, with whom Dowd J agreed, said that no significant part of the prosecution case turned on identification. The central factual dispute was whether, when the victim was attacked, there were three assailants or four. Ultimately, no question of identification arose. Kirby J said the same. He concluded that "identification evidence did not play any significant part in the proof of the appellant's guilt".

13 In this Court, the appellant relied upon the following ground of appeal:

> "The Court of Criminal Appeal erred in failing to hold that section 116 of the *Evidence Act* 1995 [(NSW)] provides a mandatory requirement to warn a jury in relation to identification evidence where such evidence is

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1 (1992) 173 CLR 555 at 561.

relied upon by the Crown, even if that evidence does not represent a 'significant part' of the proof of guilt of the offence."

14 As framed, the ground appears to accept the factual premise upon which the Court of Criminal Appeal based its conclusion, but asserts that s 116 of the Evidence Act required a warning. Under pressure of argument, that position was modified.

15 Part 3.9 of Ch 3 of the Evidence Act deals with identification evidence, which is defined in the Dictionary to the Act, relevantly, to mean an assertion, or a report of an assertion, that a defendant was, or resembles, a person who was present at a place where an offence was committed, or an act connected to the offence was done, at or about the time at which the offence was committed or the act was done.

16 The identification evidence here in question was the assertion, in the evidence of the victim, and a police witness's evidence of a previous assertion to him by the victim, that the person shown in photograph No 8 (the appellant) was, or resembled, a person who was present at or about the time of the events described by Mr Schembri. It was the assertion that the appellant was, or resembled, a man who was present at or about the time when the victim was attacked and then taken from his flat that constituted the identification evidence; not the detail of his alleged conduct. By the time the case was left to the jury, the area of dispute about that matter had been confined. The appellant did not dispute that he was present at the flat, which was where the robbery occurred and the kidnapping commenced; his case was that he had departed shortly before the alleged events occurred. Having regard to the time intervals described by Mr Schembri, and the competing suggestion put to him in cross-examination, on any view the appellant was present *at or about* the time when the offences were committed.

17 Part 3.9 applies only in criminal proceedings (s 113). Section 114 deals with the exclusion of visual identification evidence where an identification parade has not been held, but allows for the possibility that, as in the present case, it might not have been reasonable to hold such a parade. Section 115 deals with the exclusion of photographic identification evidence in certain circumstances, including cases where there is a risk of what is sometimes called the rogues' gallery effect[2]. Section 116 provides:

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2 cf *Alexander v The Queen* (1981) 145 CLR 395 at 412; *Festa v The Queen* (2001) 208 CLR 593 at 602-603 [22].

"116 (1) If identification evidence has been admitted, the judge is to inform the jury:

(a) that there is a special need for caution before accepting identification evidence, and

(b) of the reasons for that need for caution, both generally and in the circumstances of the case.

(2) It is not necessary that a particular form of words be used in so informing the jury."

18 Although counsel for both parties to the present appeal began by accepting that the provisions of s 116 are "mandatory"[3], upon further consideration they acknowledged that, in a context such as the present, such a description may be question-begging. It is the content of the mandate that must be decided.

19 If read literally, and apart from its statutory context, s 116 could be taken to mean that a judge is always required to inform the jury that there is a special need for caution before accepting identification evidence whenever identification evidence has been admitted, even if the reliability of the evidence is not in dispute. That would be absurd. If a witness claims to have seen an accused at a particular place on a particular occasion, and the truth of that assertion is not questioned or in any way put in issue, then ordinarily there is no special need for caution before accepting the evidence. The common law principle, expressed in the passage from *Domican* quoted above, contains the obvious qualification that the warning is to be given where the reliability of the evidence of identification is disputed. The same qualification is implied in s 116; if it were otherwise the provision would offend common sense.

20 Sections 114 and 115, like many other provisions of the Evidence Act, declare that evidence of a certain kind is not admissible in certain circumstances, or unless certain conditions are fulfilled. Yet evidence of a kind to which those sections refer may not be the subject of objection. Counsel for an accused person may have any one of a number of reasons for not objecting. A trial judge ordinarily will not know why no objection is taken, and may have no right to enquire. Counsel might decide not to object simply because he or she knows that that accused, upon giving evidence, will admit that the identification evidence is correct. The Evidence Act applies in an adversarial context. It is the parties, and their counsel, who define the issues at trial, select the witnesses, and choose the evidence that they will lead, and to which they will take objection. It is the duty

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3 cf *Clarke* (1997) 97 A Crim R 414 at 427 per Hunt CJ at CL.

of the prosecution, in its case, to lead the whole of the evidence to which the accused is required to make answer[4]. It will often appear, in the course of a defence case, that some, perhaps much, of that evidence is not in dispute. In that event, it will be appropriate for a judge to point that out to the jury.

21 Reference was made in *Festa v The Queen*[5] to in-court acts of identification. They provide a well known example of potentially unreliable identifications. Yet such identifications are often received into evidence, without objection, simply because they are not in dispute. When that occurs, it is only in the most technical sense that there is any question of "accepting" the evidence.

22 To give s 116 a literal meaning would produce a consequence that is wholly unreasonable[6]. The statutory requirement to give the jury certain information is to be understood in the light of the adversarial context in which the legislation operates, and the nature of the information the subject of the requirement. So understood, the provision means that the information referred to is to be given where the reliability of the identification evidence is disputed.

23 In the present case the victim, Mr Schembri, asserted to a police officer, and again a few days later in court, that the person in photograph No 8 was a person who was present at or about the time he was attacked and kidnapped. His assertion in court, and the police officer's report of that assertion, was the identification evidence to which s 116 had potential application. Let it be assumed that the assertion had been comprehensively denied. It is instructive to consider the basis of the need for special caution before accepting the evidence. Because there was a reasonable explanation for the failure to conduct an identification parade, that aspect of the matter may be put to one side. The risk of suggestibility, or the displacement effect, associated with photographs would have been relevant[7], as would the matter raised by counsel when originally objecting to the photograph, that is to say, the lapse of time between January 1999 and April 2000. There may also have been considerations relating to the quality of the photographs, the fact that all four men had previously been strangers to the victim, and other matters affecting the reliability of Mr Schembri's conclusion that photograph No 8 was a photograph of one of the four men who accompanied him to his flat. However, as the Court of Criminal Appeal pointed out, in the light of the appellant's evidence, the only question was

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4 *The Queen v Chin* (1985) 157 CLR 671 at 676-677 per Gibbs CJ and Wilson J.

5 (2001) 208 CLR 593 at 600-602 [17]-[21].

6 cf *MacAlister v The Queen* (1990) 169 CLR 324 at 330.

7 *Alexander v The Queen* (1981) 145 CLR 395.

whether the man in photograph No 8 was still there when the attack occurred, or whether he had left shortly before. It was not the reliability of the identification that was in dispute; it was the reliability of the account of the conduct of the person identified, and, in particular, of the evidence that such person remained with his three companions at all material times.

24 This ground of appeal has not been made out.

Inconsistencies

25 This was a subject on which the Court of Criminal Appeal was divided. The ground of appeal in this Court was:

> "The Court of Criminal Appeal erred in holding that a direction in relation to lies was not required in the circumstances of the case."

26 No direction in relation to lies was sought at trial. Kirby J, in dissent in the Court of Criminal Appeal, considered that the decision of this Court in *Zoneff v The Queen*[8] required a direction.

27 The relevant facts may be stated shortly. When the appellant was first interviewed by the police in September 1999, he was told that the police were investigating a stabbing and robbery in January 1999, involving an attack upon a man who had "invited a group of people from a pub at Rozelle back to his unit". The appellant was told that his fingerprints had been found in the unit. Having been given that very limited information, the appellant was asked whether he could explain how his prints came to be there. He said he had no idea. He was asked whether he had ever been to the Bridge Hotel at Rozelle. He said he had not. He said he knew nothing about the alleged occurrence.

28 In his evidence at trial, in May 2000, the appellant admitted he had been at the hotel, and that he had gone back to Mr Schembri's flat with three other men, and gave an account of what he did at the flat which, if accepted, could have provided an innocent explanation of the presence of his fingerprints.

29 In final address, the prosecutor pointed to the differences between what the appellant had said to the police in September 1999, and what he had said in evidence at the trial. The prosecutor did not put to the jury that what the appellant said to the police amounted to lies which indicated a consciousness of guilt, and no such possibility was put to the jury by the trial judge in his

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8 (2000) 200 CLR 234.

summing-up. No directions of the kind considered in *Edwards v The Queen*[9] were given, and none could reasonably have been proposed. This was not a case in which it could have been contended that it was reasonably open to the jury to find that, in his answers to the police, the appellant had deliberately lied, and that such lies reflected a knowledge on the part of the appellant that telling the truth would implicate him in the commission of the offences[10]. No such contention was advanced for the consideration of the jury. The appellant, in September 1999, was questioned about an occasion in January 1999, but was given scant information as to what had allegedly occurred. His statement that, at the time, he had no idea how his fingerprints came to be where they were found may well have been true. His statement that he knew nothing about the attack on Mr Schembri was consistent with his evidence at the trial, and a conclusion that it was untrue required, in substance, a conclusion that he was guilty of the offences charged. His statement that he had not been to the Bridge Hotel at Rozelle was inconsistent with his evidence at the trial, but was a very flimsy basis for any argument of the kind earlier mentioned.

30 The appellant, in his evidence, gave an explanation of what he said to the police, and, in his summing-up, the trial judge reminded the jury of that explanation. The appellant said that, when he was interviewed, he did not know what the police were talking about. It was not until he was charged, and read the facts sheet, that he knew what was alleged to have occurred. That was consistent with his evidence, and with the defence case at the trial.

31 The prosecutor cross-examined the appellant about the answers he had given to the police, suggesting that they were, at the least, evasive. (There was a disagreement about exactly what was put by the prosecutor. The trial judge, in his summing-up, first used, and then withdrew, the word "strange"). The trial judge said to the jury:

> "The Crown says that in [that] regard ... you will remember what the accused said when he was spoken to by the police officers at the time of his arrest and compare that to what he says to you now remembering that he received the police brief in this matter in February."

32 In the context of the whole of the evidence, and the issues as they developed at trial, there was little to be made of what the appellant said to the police in September 1999, and a reading of the summing-up indicates that little was sought to be made of it. The prosecutor was entitled to suggest, as he did,

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9 (1993) 178 CLR 193.

10 *Edwards v The Queen* (1993) 178 CLR 193 at 211.

that there were aspects of the appellant's response that could be taken to reflect adversely on his reliability. The matter did not go beyond that.

33 The facts of the case are quite different from those of *Zoneff*, where the prosecutor, in cross-examination of the accused, had attributed lies to him, but had not addressed the jury. The trial judge himself, in his summing-up, had raised the question of lies and consciousness of guilt, evidently considering that there was a risk that the jury would consider that it was part of the prosecution case that the suggested lies were evidence of consciousness of guilt[11].

34 It is not necessary for a trial judge to give a direction, either of the kind referred to in *Edwards*, or of the kind referred to in *Zoneff*, every time it is suggested, in cross-examination or argument, that something that an accused person has said, either in court or out of court, is untrue or otherwise reflects adversely on his or her reliability. Where the prosecution does not contend that a lie is evidence of guilt, then, unless the judge apprehends that there is a real danger that the jury may apply such a process of reasoning, as a general rule it is unnecessary and inappropriate to give an *Edwards* direction[12]. *Zoneff* was said to be an unusual case[13], and the direction there proposed was said to be appropriate where there is a risk of misunderstanding about the significance of possible lies. The present was not such a case.

35 This ground of appeal has not been made out.

Conclusion

36 The appeal should be dismissed.

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11 *Zoneff v The Queen* (2000) 200 CLR 234 at 244 [16]-[17].

12 *Zoneff v The Queen* (2000) 200 CLR 234 at 244 [16]; *Burge and Pegg* [1996] 1 Cr App R 163 at 173.

13 (2000) 200 CLR 234 at 245 [23].

37 McHUGH AND GUMMOW JJ. This is another appeal in which a convicted person seeks to quash a conviction on the ground that the trial judge failed to direct the jury concerning some part of the evidence in the trial even though his or her counsel did not apply for any such direction or indeed any re-direction.

38 When no re-direction concerning evidence is sought at a criminal trial, the appellant can only rely on a failure to direct the jury on the evidence if he or she establishes that that failure constituted a miscarriage of justice. No miscarriage of justice will have occurred in such a case unless the appellant demonstrates that the direction should have been given and it is "reasonably possible" that the failure to direct the jury "may have affected the verdict"[14]. In the present case, the judge was not required to give one of the directions that the appellant now claims should have been given – a direction as to identification evidence. And although we think that it would have been better for the judge to give a direction concerning the other matter – a direction as to lies – the appellant has failed to establish that there is a reasonable possibility that such a direction would have affected the verdict. Accordingly, no miscarriage of justice has occurred.

Statement of the case

39 In the District Court of New South Wales, a jury convicted the appellant, Raju Kamaljeet Dhanhoa, of two offences against the *Crimes Act* 1900 (NSW) – "aggravated robbery in company with wounding" (s 98) and "detain for advantage and cause injury" (s 90A). The offences occurred on the night of 19 January 1999.

40 Dhanhoa appealed to the Court of Criminal Appeal on three grounds. First, that the trial judge had failed to give directions concerning identification evidence as required by s 116 of the *Evidence Act* 1995 (NSW). Secondly, that the trial judge had failed to direct the jury concerning evidence from which the jury might have inferred that he had lied to police officers out of a consciousness of guilt. Thirdly, that the verdict was unreasonable. The Court of Criminal Appeal dismissed the appeal.

41 This Court granted Dhanhoa special leave to appeal on two grounds relied on in the Court of Criminal Appeal – identification and lies – and on the further ground that that Court had failed to give adequate reasons for its decision. No oral submissions were made on the hearing of the appeal by this Court upon that third ground of appeal. It is well settled that, in giving its reasons, the Court of Criminal Appeal was obliged to articulate the essential grounds for the formation

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14 *Simic v The Queen* (1980) 144 CLR 319 at 332.

of its conclusions[15]. The question whether the Court of Criminal Appeal did so in the present case is subsumed by the conclusion reached in this Court, upon its examination of the record, that the result reached by the Court of Criminal Appeal, in dismissing the appeal to it, should not be disturbed. Hence it is unnecessary any further to consider the third ground of appeal to this Court.

The material facts

42 The victim testified that, while at the Bridge Hotel in Rozelle, he had invited four men – whom he had not previously met – back to his flat. They were of Indian or Sri Lankan appearance. After a few minutes, they attacked him. One man stabbed him twice, causing severe injuries to his liver and to one of his lungs. One of the men stole his wallet. The four men then forced him from his flat at knife-point with the object of taking him to an automatic-teller machine to get money from his bank account. Outside his flat, they attempted to force him into a car. After a struggle in the street and – as he later found – being stabbed again, the victim was able to escape and run into a neighbour's house.

43 At the trial, two neighbours of the victim testified that, although they could not see everything that happened, they saw him struggling in the street with three men who were trying to force him into a car. Although they saw only three men, their evidence was not inconsistent with a fourth man being present.

44 The police were called. They examined the flat for fingerprints. On a coffee table, they found fingerprints that were later identified as belonging to Dhanhoa. But no arrest was made for well over a year.

45 On 27 September 1999, police officers told Dhanhoa that the police were investigating a stabbing and robbery that had occurred in January 1999 after the victim had invited some men "from a pub at Rozelle back to his unit". The officer told Dhanhoa that his fingerprints had been found on a coffee table in the victim's unit. Dhanhoa said that he had no idea how his fingerprints came to be in the unit and that he had never been to the Bridge Hotel at Rozelle. He denied knowing anything about the attack and robbery.

46 In April 2000, fifteen months after the robbery, a police officer showed the victim 11 photographs. He said that the person in one of the photographs – No 8 – was "very similar" to one of the men who had attacked and robbed him. That photograph was of Dhanhoa. At the trial, the 11 photographs were tendered in evidence.

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15 *Dinsdale v The Queen* (2000) 202 CLR 321 at 329 [21].

47 When Dhanhoa gave evidence in support of his plea of Not Guilty, he admitted he had been at the hotel at Rozelle and that he had gone to the victim's flat with three other men. He did not deny that he was the man in photograph No 8. But he denied participating in the robbery or detention of the victim. He said that, after smoking marijuana at the flat, he left the other three men and the victim who were arguing and caught a taxi home.

Miscarriage of justice

48 Section 6 of the *Criminal Appeal Act* 1912 (NSW) specifies the grounds upon which the Court of Criminal Appeal may allow an appeal against a conviction. It is required to do so "if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence". It is also required to do so, if it is of opinion that the judgment of the trial court should be set aside on the ground "of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice".

49 Because the trial judge was not asked to direct the jury, he did not make a "wrong *decision* of any question of law". (our emphasis) Thus, the only ground that is relevant in the present case is that the failure to direct the jury on identification or lies or both "was a miscarriage of justice". In a case where the judge has misdirected the jury on the evidence[16] or failed to refer to evidence[17], it is for an appellant to establish that the misdirection or non-direction constituted a miscarriage of justice[18]. Similarly, it is for the appellant to establish that the trial judge's failure to give a direction concerning some aspect of the evidence constituted a miscarriage of justice. In such a case, a miscarriage of justice will have occurred if the direction should have been given and it is "reasonably possible" that the failure to direct the jury "may have affected the verdict"[19].

The trial judge's directions

(1) *Identification*

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16 *R v Brookes and McGrory* [1940] VLR 330; *Simic v The Queen* (1980) 144 CLR 319 at 327.

17 *Cohen and Bateman* (1909) 2 Cr App R 197 at 207-208.

18 *Simic v The Queen* (1980) 144 CLR 319 at 332; *TKWJ v The Queen* (2002) 76 ALJR 1579 at 1591 [71]; 193 ALR 7 at 24.

19 *Simic v The Queen* (1980) 144 CLR 319 at 332.

50 The Crown conducted the case against Dhanhoa as a case of a joint criminal enterprise for which each participant in the crime was jointly responsible for the acts and omission of every other participant[20]. The learned trial judge directed the jury:

> "The Crown says you will be satisfied beyond reasonable doubt that at all relevant times the accused was present when the acts described by [the victim] took place and therefore he is jointly responsible with the other three men of the robbery and wounding of [the victim] and also the taking [him away] from the unit for an advantage to themselves ..."

51 The victim had testified that all four men including the man in photograph No 8 were present and participated in the stabbing, robbery and detention of him. Because that was so, the judge directed the jury that the issue for them was whether the Crown had proved beyond reasonable doubt "that [Dhanhoa] was one of the group of men" who had assaulted, robbed, wounded and kidnapped the victim. His Honour gave no direction concerning the dangers of identification evidence. That is not surprising because at the end of the evidence, identification was not an issue. Dhanhoa admitted that he had been at the flat with the other men. The only issue was whether he had left the flat before the assault, robbery and detention took place.

52 Before Dhanhoa gave evidence, identification was a vital issue in the case. Until he gave evidence, the prosecution case depended on the jury being satisfied beyond reasonable doubt that the man in photograph No 8 was one of the men who were at the flat and who had attacked and robbed the victim. If Dhanhoa had continued to deny that he was at the victim's flat, the judge would have been bound to direct the jury of the danger of relying on the victim's identification of the man in photograph No 8 as one of the attackers[21]. But after Dhanhoa gave evidence, identification was no longer an issue. Nevertheless, Dhanhoa contends that s 116 of the *Evidence Act* required the trial judge to warn the jury of the need for caution before accepting the victim's identification evidence. He points out that s 116 declares that "[i]f identification evidence has been admitted, the judge is to inform the jury ... that there is a special need for caution before accepting identification evidence, and ... of the reasons for that need for caution".

53 The obligation imposed by s 116 must be read in the context of the adversarial system of criminal justice. It is not to be supposed that, in enacting that section, the legislature intended that juries be given directions concerning

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20 *Osland v The Queen* (1998) 197 CLR 316.

21 *Evidence Act* 1995 (NSW), s 116.

identification evidence when identification was not an issue. It is not to be supposed that the legislature intended a trial judge to give a direction that was not relevant to the issues in the case. Not only would it be a waste of curial time and effort but the giving of an irrelevant direction would be likely to confuse the jury who understandably would be puzzled as to what significance the direction had.

54 The contention that the trial judge erred in not giving a direction in accordance with s 116 must be rejected.

(2) *Lies*

55 Dhanhoa alleges that the Court of Criminal Appeal "erred in holding that a direction in relation to lies was not required in the circumstances of the case." At the trial, counsel for Dhanhoa did not seek any direction in relation to lies. Despite this omission, Kirby J, who dissented in the Court of Criminal Appeal, held that this Court's decision in *Zoneff v The Queen*[22] required such a direction.

56 In his summing up, the trial judge referred to a submission by the Crown that, when police officers had interviewed Dhanhoa in September 1999, he said that he did not know what they were talking about until he got the statement of facts after he was charged. The trial judge referred to this submission several times during his summing up. In one passage, his Honour said:

> "The Crown says that ... you will remember what the accused said when he was spoken to by the police officers at the time of his arrest and compare that to what he says to you now remembering that he received the police brief in this matter in February."
>
> The judge then said:
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> "All those matters are part of the Crown case and it is for you to determine whether there is any relevance in that or whether there is not. It is entirely a matter for you."

57 If it had not been for this last statement, there would be no arguable ground for upholding the contention that the trial judge should have directed the jury concerning the effect of lies if they thought Dhanhoa had lied to the police.

58 If the jury found that Dhanhoa had lied to the police, they were entitled to infer that his evidence lacked credibility. But we think that, if the Crown had asked for a direction, the jury were also entitled to conclude that he had lied because he knew that the victim had been assaulted, robbed and detained. That is

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22 (2000) 200 CLR 234.

to say, the jury were entitled to think that he had lied because he was conscious that he was guilty of participating in the crimes and could give no innocent explanation for his presence at the flat if he had admitted that he was there[23]. But the Crown made no attempt to run a case of consciousness of guilt. At no stage of Dhanhoa's cross-examination did the prosecutor expressly suggest to him that he had lied to the police because he had a consciousness of guilt. And because that was so, the trial judge did not direct the jury that, if they thought he had lied to the police, they could use the lie as evidencing a consciousness of guilt on his part. But the trial judge did direct the jury that various matters – one of which was the difference between what the accused told the jury and what he told the police – was "part of the Crown case and it is for you to determine whether there is any relevance in that".

59 It is possible, therefore, that the jury may have reasoned that the accused was guilty because he had lied to the police. It is not necessary for a trial judge to give a direction concerning lies as evidence of guilt whenever a prosecutor suggests directly or indirectly that an accused's out-of-court statement is a lie[24]. But in this case it would have been better if the trial judge, having given the direction that he did, had instructed the jury as to how they were to use any lie told by the accused. Given the way that the Crown conducted its case, it would have been better if the trial judge had directed the jury that the accused's lies, if they found he had lied, only affected his credibility.

60 However, it is not enough to establish that a miscarriage of justice has occurred by showing that it would have been better if the trial judge had given an appropriate direction concerning the effect of lies or that there is a possibility that the jury may have reasoned that the accused was guilty because he had lied to the police. To succeed in the appeal, Dhanhoa must establish that it is a *reasonable* possibility that the failure to direct the jury "may have affected the verdict"[25]. We do not think that he has done so.

61 Given the way that the prosecution conducted its case, we think that there is only a very slender possibility that the jury would have considered that his statement to the police indicated a consciousness of guilt. The jury would have done so only if, despite the way the Crown conducted its case, the jurors decided to add consciousness of guilt to the process of reasoning on which the Crown relied. It is true that the trial judge told the jury that it was a matter for them to

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23 cf *Eade v The King* (1924) 34 CLR 154 at 158.

24 *Zoneff v The Queen* (2000) 200 CLR 234 at 244 [16].

25 *Simic v The Queen* (1980) 144 CLR 319 at 332.

determine whether there was any relevance in the claimed inconsistency. But that was not an invitation to use consciousness of guilt reasoning although it is, of course, possible the jury decided to use it. But even if the jury decided to examine the accused's answers to the police as indicating a consciousness of guilt, to succeed in this appeal Dhanhoa must show a reasonable possibility that they convicted him because they took his statements as evidencing that consciousness.

62 The appellant's most important statement to the police was that he knew nothing about the stabbing or robbery of the victim. But that statement was consistent with his evidence at the trial. The jury's verdict shows that both his statement and his evidence about this matter were lies. But an out-of-court statement is not a lie that can be used as indicating a consciousness of guilt unless ordinarily there is other evidence that indicates it is a lie. In some cases, however, an accused's out-of-court explanation may be so patently false that it is a lie that is evidence of consciousness of guilt[26]. Consciousness of guilt reasoning must ordinarily precede – not follow – a criminal verdict of guilty. It may be in some extreme case, however, that the evidence of the accused is so flagrantly untruthful on a particular point that it itself indicates a consciousness of guilt[27].

63 The jury may have thought, however, that the appellant's statements that he had "no idea" how his fingerprints came to be on the coffee table and that he had never been to the hotel at Rozelle were untrue. If they did, admittedly there is a possibility that they would also have concluded that he had lied about these matters because he was conscious that he was guilty of attacking and robbing the victim. However, to conclude that the jury reasoned in this way is simply speculative. Significantly, counsel for Dhanhoa sought no direction concerning lies. Nor, as we have said, did the trial judge give any such direction. This strongly indicates that it did not occur to those present at the trial that lies as consciousness of guilt was an issue in the trial or that, from the conduct of the case, the jury might think that lies told by the appellant were evidence of a consciousness of guilt.

64 Accordingly, we do not think that there is a reasonable possibility that the verdict of guilty would have been different if the trial judge had given a direction concerning lies. Indeed, to have given a direction about lies – to have given an

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26 *R v Wurch* (1932) 58 CCC 204 at 206-207.

27 cf *MacDonald v The King* (1946) 87 CCC 257 at 267 and 269.

Edwards direction[28] – might not only have emphasised the issue but made it difficult for the jury to disregard consciousness of guilt as an issue.

65 The appellant has failed to establish that his trial involved any miscarriage of justice.

Order

66 The appeal should be dismissed.

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28 *Edwards v The Queen* (1993) 178 CLR 193 at 210-211.

67 CALLINAN J. This appeal raises two questions: as to the meaning and application of s 116 of the *Evidence Act* 1995 (NSW) ("the Act"); and whether a direction should have been given to the jury with respect to evidence of the appellant from which it could be inferred that he had lied out of a consciousness of guilt.

Facts

68 On the evening of 19 January 1999 Mr Schembri went to an hotel in the Rozelle district of Sydney to play pool. The appellant and three other men whom he thought to be of Indian or like appearance befriended him. They accepted an invitation to return with him to his nearby flat to smoke some marijuana. Mr Schembri was a tidy person. During the day he had cleaned his flat and wiped a coffee table in it with a cloth. After smoking some marijuana, and a discussion about Korean martial art, one of the guests inflicted a severe head-butt on Mr Schembri. Another held him by the throat against a wall. A third took a knife from a kitchen drawer and stabbed him twice, severely damaging his liver and one of his lungs. One of the men stole his wallet, and another armed himself with Mr Schembri's (imitation) samurai sword. Mr Schembri was unable to say with certainty who committed each assault upon him.

69 His attackers then forced Mr Schembri down to the street with a view to driving him in their car to an automatic teller machine in order to steal money from his bank account. Mr Schembri was quite certain that all four of the men did this: two of them had his arms, one walked in front of him, and another walked behind him.

70 After some scuffles in the street, a further stabbing, and before they could put him in their car, Mr Schembri broke away and fled to the house of a neighbour who was able to succour him. It was only when he was in the neighbour's house that Mr Schembri realized he had been stabbed again, this time in the back. Two other neighbours, hearing the noise of the scuffles, opened their windows and saw what was happening. Both of these witnesses said that they saw three, and not four assailants attacking Mr Schembri. Mr Schembri was however consistently emphatic that four men, including the appellant, were present throughout.

71 The appellant's fingerprints were found on the coffee table in Mr Schembri's flat. The appellant was interviewed by police officers about eight months after the assaults. He said that he had "no idea" how his fingerprints came to be on Mr Schembri's coffee table and that he had never been to the hotel at Rozelle. In short he knew "nothing about it". The appellant agreed to participate in an identification parade. Abortive attempts were made a few weeks before the trial to conduct such a parade. Difficulties in locating a sufficient number of people of generally Indian appearance had apparently prevented the police from arranging a parade at an earlier time. On 28 April 2000, some

15 months after the attack, Mr Schembri was shown a number of photographs from which he identified the appellant.

The trial

72 The appellant was charged and convicted of the offences of "aggravated robbery in company with wounding" (s 98 *Crimes Act* 1900 (NSW)), and "detain for advantage and cause injury" (s 90A *Crimes Act* as it then stood). He was sentenced to an effective total period of imprisonment of 7 1/2 years with a non-parole period of four years, to begin from 5 May 2000.

73 Mr Schembri's evidence at the trial with respect to the photographs was as follows:

> "Q Which one of the four men was picture number eight?
>
> A Two of them looked very similar so I am not 100 percent of which one of the two that it was but I am sure that it was one of them.
>
> Q Just to recount which two of the persons were very similar?
>
> A The one that got up from the couch with his arm stretched out, the one that strangled me.
>
> Q Yes?
>
> A And the one that stood at the kitchen and grabbed the knife for the guy when he asked for it.
>
> Q You said they were very similar are you able to say which one of the two you believe it to be?
>
> A I think it was the one that got up from the couch and walked over to me."

74 An investigating police officer, Detective Cipolla, confirmed that Mr Schembri identified the appellant who was the subject of photograph number eight, and gave this evidence:

> "Q Did [the victim] indicate to you that number eight appeared to him to be familiar to being the person who grabbed him by the neck and pinned him to the wall, however his face was a bit thinner and I think he had a bit more hair?
>
> A That's correct."

75 The appellant's evidence was that he left the hotel with Mr Schembri and the three other men. On arrival at Mr Schembri's flat the appellant smoked some marijuana. He said that he used a bong that one of the group had brought with him. He said that he smoked two cones. When asked to account for the presence of his fingerprints on the coffee table, he said that he could not recall touching the table but that he may have done so when he put the bong on the table.

76 The appellant said that after a while he became aware that the others were arguing. The marijuana made him "paranoid" about the arguing. He went out of the flat to get some fresh air. He walked to Victoria Road and caught a taxi home. He said that while he was at the flat he did not see a knife held at Mr Schembri, did not see him manhandled, and did not hear any demand for money. He was not part of the group in the street when Mr Schembri was again attacked.

77 The trial judge summed up on the evidence with respect to the interview of the appellant in this way:

> "[The accused] told you how he came to be first spoken to by the police in September 1999 about this matter and how he was asked a series of questions about events which occurred on 20 January. He agreed that he told Constable Napper that he didn't know what he was talking about. He said I said that because at that time I didn't know what he was talking about. It was not until I was charged and I got the facts sheet that I knew what he was talking about. The Crown says, well that's strange because according to the conversation Constable Napper made it clear that they were talking about a stabbing and a robbery that happened at Balmain and a person was stabbed five times after he'd invited a group of people from a pub at Rozelle back to his unit and those people took properties from his unit and abducted him so that he could access his account at an ATM and that that was made clear to him from the outset. The accused says, in effect, that, well I didn't appreciate that at the time, I didn't appreciate that until I was able to read the facts sheet after I had been charged."

78 His Honour again reminded the jury of the appellant's explanation for his answers. He drew attention to the cross-examination on this issue and later said:

> "When I was talking about the evidence of the police officers who spoke to Mr Schembri in September 1999 I used the expression I think about that, the Crown says it is strange and the accused said to you that he had no recollection or no knowledge of what they were talking about until he got the statement of facts after he was charged.
>
> I used the expression the Crown said it was strange that he should say that bearing in mind that the police officers told him they were making

> inquiries about a robbery and about a wounding and a taking of property which was the brief summary of facts giving rise to their investigation.
>
> I am reminded by the Crown and by counsel for the accused that the Crown did not say it was strange and the fact is that that conversation did take place at that time between the police officers and the accused but the Crown Prosecutor did not use the word 'strange' in relation to it."

79 The issue was again raised by the trial judge in the following direction:

> "The Crown says that in [that] regard ... you will remember what the accused said when he was spoken to by the police officers at the time of his arrest and compare that to what he says to you now remembering that he received the police brief in this matter in February."

His Honour immediately went on to say:

> "All those matters are part of the Crown case and it is for you to determine whether there is any relevance in that or whether there is not. It is entirely a matter for you."

Neither the appellant nor the respondent sought any redirections.

The appeal to the Court of Criminal Appeal

80 An appeal to the Court of Criminal Appeal (Meagher JA, Dowd and Kirby JJ) was dismissed. Meagher JA (with whom Dowd J agreed in substance) was of the opinion that a relevant issue of identification did not arise as the case was fought on the question whether there were three assailants or four. His Honour noted that there was "plenty of evidence either way" on this issue. He accepted that the evidence of identification was not strong. His Honour made no reference to the Act.

81 Meagher JA determined the appellant's other ground with respect to the trial judge's summing up in this way:

> "The appellant's submissions are that [the interview with the appellant] can only have been led as evidence of guilt, in which case an *Edwards v The Queen*[29] direction should be given; or as evidence going to credibility in which case a *Zoneff v The Queen*[30] direction should have been given. It is clear enough that the second possibility can be discarded. Not so the

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29 (1993) 178 CLR 193.

30 (2000) 200 CLR 234.

first. I cannot see why the evidence was led unless the Crown sought to rely on it as evidence of consciousness of guilt, but if that be true, it is extraordinary that the Crown did not rely on it when addressing the jury, and equally extraordinary that the Judge did not tell the jury exactly what its significance was. Nor, for that matter, did the appellant's counsel ask for an *Edwards* direction. In all the circumstances, if the ground is made out (which I don't think it is), I should nonetheless dismiss the appeal by applying the proviso to s 6(1) of the *Criminal Appeal Act.*"

The appeal to this Court

82 The appellant relies in this Court on the same grounds of appeal as he did in the Court of Criminal Appeal, and a further ground that the Court of Criminal Appeal failed to give adequate reasons for its decision.

Identification evidence

83 In the dictionary of terms used in the Act, "identification evidence" is expansively defined as follows:

"***identification evidence*** means evidence that is:

(a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:

(i) the offence for which the defendant is being prosecuted was committed, or

(ii) an act connected to that offence was done,

at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time, or

(b) a report (whether oral or in writing) of such an assertion."

84 Neither the definition, nor, as will appear, s 116 of the Act makes any reference to disputes about identification.

85 There is no doubt that Mr Schembri's evidence, that the appellant was present in his flat and in the street when he was assaulted by the four men including the appellant, and his identification of the appellant in a photograph, falls literally within the definition of identification evidence in the Act.

86 That being so, it would appear to follow from s 116 of the Act which is expressed in mandatory language, and which I will set out, that the trial judge was bound to caution the jury about the evidence in question.

> "**116 Directions to jury**
>
> (1) If identification evidence has been admitted, the judge is to inform the jury:
>
> (a) that there is a special need for caution before accepting identification evidence, and
>
> (b) of the reasons for that need for caution, both generally and in the circumstances of the case.
>
> (2) It is not necessary that a particular form of words be used in so informing the jury."

87 Evidence of identification has always been treated with some tenderness by the courts. Most jurisdictions are, and all in Australia should be diligent in the prevention of the publication of photographs of an accused person before the conclusion of criminal proceedings. This is so because of the two particular respects in which such a publication can contaminate a criminal trial. As Jordan CJ said in *Ex parte Auld; Re Consolidated Press Ltd*[31]:

> "Now, in any criminal charge in which the identity of the accused with the perpetrator of the alleged crime may be called in question, the publication of a photograph of the accused may tend very seriously to prejudice a fair trial. The reasons for this were stated by Halse Rogers J, last year, in *Ex parte Brady* (unreported), when his Honour said: 'Anybody who has presided in criminal courts is fully aware of the difficulties which do arise through the publication in a widely distributed newspaper, after his arrest, of the photograph of a man charged with an offence. In some cases the publication tends to injure the accused; but the fact of such publication is very often used by the defence as a method of endeavouring to discredit the evidence of Crown witnesses by suggesting that they have founded the whole of their identification of an accused person on the published photograph, though they may possibly never have seen it.'"

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31 (1936) 36 SR(NSW) 596 at 597.

88 His Honour referred[32] to another disturbing tendency on the part of publishers of such material which unhappily can still be discerned on occasions in this country some 67 years later:

> "I repel the suggestion that, because a journalist has learnt from the police that an alleged confession has been made, or fingerprints found, he may assume that identity cannot come in question. Indeed, the evidence which has been placed before us in this case, in an attempt to justify the publication, would almost suggest that there is an impression that a junta of police officers and journalists can hold a sort of preliminary settling of the issues likely to be tried at the hearing, and that this Court ought not lightly to interfere with their rulings as to the probability of identity being raised."

89 *Auld* and the numerous cases in which it has been applied[33] emphasize the likelihood that in many, indeed perhaps a majority of criminal cases, the identification of the accused will be likely to be in issue. Those cases, and the cases[34] in which the frailty and unreliability of identification evidence generally have been exposed on appeal provide good reason to require the giving of cautionary directions when identification is in issue. Section 116 of the Act is no doubt a legislative response to the difficulties that have been encountered in such cases. Its drafting does however create its own difficulties. It is inappropriately prescriptive, just as some other provisions of the Act and its Commonwealth analogue inappropriately confer discretions in place of earlier, reasonably clear rules which proved generally satisfactory in practice. As an Act which had as one of its purposes the clarification and simplification of evidentiary questions, it

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32 (1936) 36 SR(NSW) 596 at 598.

33 For example: *Attorney-General (NSW) v Time Inc Magazine Co Pty Ltd* unreported, Supreme Court of New South Wales, 15 September 1994 at 9 per Gleeson CJ, with whom Sheller and Cole JJA agreed; *Attorney-General (NSW) v Time Inc Magazine Co Pty Ltd* unreported, Supreme Court of New South Wales, 7 June 1994; *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 381 per Gleeson CJ, Kirby P and Priestley JA; *R v Australian Broadcasting Corporation* [1983] Tas R 161; *Attorney-General (NSW) v Mirror Newspapers Ltd* [1962] NSWR 856; *R v Pacini* [1956] VLR 544 at 549.

See also the consistent approach of courts in England and New Zealand: *R v Daily Mirror; Ex parte Smith* [1927] 1 KB 845; *Attorney-General v Noonan* [1956] NZLR 1021; *Attorney-General v Tonks* [1934] NZLR 141.

34 *Smith v The Queen* (2001) 206 CLR 650; *Bulejcik v The Queen* (1996) 185 CLR 375; *Pitkin v The Queen* (1995) 69 ALJR 612; 130 ALR 35; *Prasad v The Queen* (1994) 68 ALJR 194; 119 ALR 399; *Domican v The Queen* (1992) 173 CLR 555.

has had at best mixed success. Far too often this Court[35] has had to decide questions arising under it, for which in the past, common law, or earlier well understood statutory provisions provided the answer. The number and complexity of those cases exceed what might ordinarily be expected in respect of even a new and significantly changed legislative regime.

90 The question is however whether as a matter of practical reality s 116 of the Act should, and can be given an invariably mandatory construction and application. Although it is true that there are numerous cases in which there is an issue about identification, there are also many in which there is not. Numerous instances of the latter were referred to in argument: for example, when a complainant gives evidence that the accused assaulted her at a certain time and place, her evidence, placing him at the scene of the crime and connecting him with it, would answer the dictionary definition of identification evidence even though the real issue may be as to consent, or mistake, and have nothing to do with identification in fact. Sometimes, an accused, appreciating that the evidence of identification is beyond dispute, will be content to have it adduced in a leading form. Nonetheless the Crown may be bound to tender the evidence to establish an element of the offence, or simply as part of the proof that the accused committed it. Sometimes the Crown will not even know whether identification is in issue until the defence case has commenced or has almost ended, particularly in New South Wales in which, remarkably, there appears to be no practice of requiring an accused to indicate in an opening speech which witnesses are to be called, or even the nature of the defence.

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35 For example: *MFA v The Queen* (2002) 77 ALJR 139; 193 ALR 184 (ss 55 and 164); *Dyers v The Queen* (2002) 76 ALJR 1552; 192 ALR 181 (s 20); *De Gruchy v The Queen* (2002) 76 ALJR 1078; 190 ALR 441 (s 98); *Azzopardi v The Queen* (2001) 205 CLR 50 (s 20); *Stanoevski v The Queen* (2001) 202 CLR 115 (character evidence (s 112)); *Grey v The Queen* (2001) 75 ALJR 1708; 184 ALR 593 (s 165); *Mann v Carnell* (2000) 201 CLR 1 (privilege (s 118)); *RPS v The Queen* (2000) 199 CLR 620 (inferences from failure to give evidence (s 20)); *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 (privilege (ss 118, 119)); *HG v The Queen* (1999) 197 CLR 414 (opinion evidence (s 76)); *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 (interaction between the *Evidence Act* 1995 (Cth) and the *Family Law Act* 1975 (Cth)); *Papakosmas v The Queen* (1999) 196 CLR 297 (previous representations (ss 55, 56, 59, 66, 135, 136)); *Graham v The Queen* (1998) 195 CLR 606 (the meaning of "fresh in the memory" (s 66)); *Lee v The Queen* (1998) 195 CLR 594 (interpretation of the effect of hearsay provisions (s 60)).

91 These matters argue against a universally mandatory construction of s 116 of the Act. The Law Reform Commission Report[36] commending the enactment of the Act throws no light upon the reason for the expansive language chosen although the words "special need for caution" appear to have been used in the first instance in the case of *R v Turnbull*[37]. Despite that, *Turnbull* is discussed by the Commission in terms[38] which acknowledge the existence of a relevant dispute before a cautionary direction need be given, the section as drafted does not reflect that requirement. The reference to "disputed identification evidence" in the report may also be misleading because the dispute will usually be about identification, and not the evidence of it which may be clearly relevant and therefore indisputably admissible.

92 I have formed the opinion that s 116 should not be given a reading which requires a special precautionary direction unless there is a relevant issue of identification, for three reasons. First, the use of the word "admitted" instead of "tendered" or "received" tends to suggest a dispute with respect to identification, and therefore a controversy on the evidence about it. Secondly, the use of the words "special need for caution" implies that there is something in the case in relation to identification which calls for the special treatment of the evidence of identification: if there were no issue about it there would not be a need, let alone any special need for caution.

93 Thirdly, because s 116(1)(b) of the Act draws attention to the circumstances of the case, it is to those that regard must be had. And if in the circumstances of the case identification is not disputed, then a direction counselling caution about it, would seem to a jury to be bizarre.

94 I would conclude therefore that s 116 applies only to those cases in which the identification of the accused as the, or a perpetrator of the relevant acts, or as the person omitting to do the relevant acts is in issue.

95 It may be accepted, as Meagher JA in the Court of Criminal Appeal held, that the principal question that was litigated at the appellant's trial was whether there were three assailants or four. It may also be accepted that once the appellant was confronted with the fingerprint evidence he was bound to, and did concede that he had at some relevant time been in Mr Schembri's flat. Even so, I

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36 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985) vol 1.

37 [1976] 3 WLR 445 at 447; [1976] 3 All ER 549 at 551-552.

38 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985) vol 1 at par 128.

do not think that it can be said that there was no issue of identification sufficient to attract a cautionary direction of the kind which s 116 of the Act on its proper interpretation requires. There remained an issue whether the appellant was a person who was present when the offences, involving as they did, the further assault in the street, were committed. As to that matter there was conflicting evidence from the neighbours. In my opinion the trial judge should therefore have given a direction that there was a special need for caution in accepting the evidence of Mr Schembri that there were four, rather than three men in the street who were assaulting him: and, further, even though the appellant had admitted that he was present at the flat before any assaults were committed, because Mr Schembri was unable to say with clarity which of the persons present committed each assault, the jury should be cautious in dealing with Mr Schembri's evidence that four men assaulted him in the flat. Because of the continuing nature of the conduct of the assailants, any doubt engendered by a precautionary direction with respect to their number in the street might well have affected the minds of the jury as to the appellant's presence in the flat when the assaults were committed there. There was accordingly a dispute about the identity of the appellant as an assailant in both the flat and the street, although not about his identity as a person present at the flat after leaving the hotel. In my view the appellant has made out his first ground of appeal.

96 I am of the opinion that the second ground of appeal has also been made out. Whilst it is correct that the respondent did not make any submission that the appellant had told lies with respect to his presence at the flat, and that those lies were told out of a consciousness of guilt, it is difficult to see how the evidence in relation to the appellant's account of his presence at the flat could have had any other implication. No doubt that evidence went to credit, but like a great deal of other evidence going to credit at trial, it also inevitably went to the central issue, of guilt or otherwise. And this was so as a matter of ordinary understanding, whether the respondent or indeed the trial judge chose to say anything explicit about it or not. True also it may have been that in the cross-examination to which the respondent drew the Court's attention there was no direct and overt suggestion to the appellant that he had told lies out of a consciousness of guilt, the cross-examination nonetheless, unmistakably, if subtly, made that suggestion.

97 Occasion did therefore arise at the trial for the giving of a direction of the kind to which *Edwards v The Queen*[39] refers. The second ground of appeal is accordingly also made out.

98 It is unnecessary in the circumstances to deal with the appellant's third ground of appeal.

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39 (1993) 178 CLR 193.

99 The respondent submits that even if the appellant makes out any, or all of his grounds of appeal, the Court should apply the proviso and uphold the convictions in accordance with s 6 of the *Criminal Appeal Act* 1912 (NSW)[40].

100 Had the appellant succeeded on ground one only I might well have been inclined to uphold the respondent's submission, particularly as no application for a relevant redirection was made. The principal issue at the trial was much as the Court of Criminal Appeal described it, of the appellant's presence or not in the flat at the time of the assaults and subsequently in the street. But ground one does not stand alone, and success on it, coupled with the appellant's more substantial success on ground two, means that I cannot be satisfied that the appellant has not been deprived of a chance of acquittal[41].

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40 "**6 Determination of appeals in ordinary cases**

(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

41 Whether that be: a fair chance, *Festa v The Queen* (2001) 208 CLR 593 at 653 [199], 662 [229] per Kirby J, 669 [253] per Callinan J; *Grey v The Queen* (2001) 75 ALJR 1708 at 1710 [6], 1714 [27] per Gleeson CJ, Gummow and Callinan JJ, 1717-1718 [47], 1719-1720 [56] per Kirby J; 184 ALR 593 at 595-596, 601, 606, 608-609; a real chance, *Grey v The Queen* (2001) 75 ALJR 1708 at 1719 [54] per Kirby J; 184 ALR 593 at 608; *Stanoevski v The Queen* (2001) 202 CLR 115 at 128 [50] per Gaudron, Kirby and Callinan JJ, 131-132 [67] per Hayne J; or a chance that was reasonably open to him, *De Gruchy v The Queen* (2002) 76 ALJR 1078 at

(Footnote continues on next page)

101 I would allow the appeal, quash the verdicts of guilt and order that the appellant be re-tried on the two counts with which he was charged.

1095 [116] per Callinan J; 190 ALR 441 at 465; *Conway v The Queen* (2002) 209 CLR 203 at 234-235 [87] per Kirby J.